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Nos. 82-1005, 82-1247 and 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A. INC., a corporation,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING THE POSITION OF PETITIONERS

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING THE POSITION OF PETITIONERS

This brief amicus curiae in support of the position of petitioners is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Mid-America Legal Foundation ("Mid-America") has an interest in the disposition of the case which is before this Court on writs of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in Natural Resources Defense Council, Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982), based upon the expertise and purpose of this organization.

Mid-America was organized in 1975 to engage in legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in issues of a national scope that originate in or have a direct effect on the mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin.

The mid-America region is one of the most important manufacturing areas of the nation. At least three states in the area have proposed use of the "bubble concept" in conjunction with the requirements of the Clean Air Act.[1] The decision below, which invalidated use of the bubble in the context of the new source review requirements in nonattainment areas, could hamper seriously the ability of states to accelerate compliance with clean air standards.

Amicus presents data from the Harvard Business School case study of an air pollution control program utilizing the bubble concept on an existing source at the Middletown, Ohio steel plant of Armco Inc. Although the issue before this Court for review involves a somewhat different application of the bubble than that presented by the Armco experience, the Harvard Study pinpoints an element common to use of the bubble in any context; namely, that use of the bubble

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1 See 48 Fed. Reg. 31,400 (July 8, 1983) (Ohio); 7 Ill. Admin. Reg. 8091 (July 8, 1983) (Ill. Pollution Control Board R81-20 (Docket A)); 325 Ind. Admin. Code 2-4 (1983) (Ind. Air Pollution Control Board).

can improve air quality and accelerate compliance with clean air standards.

SUMMARY OF ARGUMENT

The court of appeals has invalidated regulations of the Environmental Protection Agency that allowed the application of a bubble concept to new source review requirements in areas which have not attained the national ambient air quality standards under the Clean Air Act, 42 U.S.C. §§ 7401-7626 (Supp. IV 1980) (the "Act"). It did so by ruling that the bubble concept is incompatible with those provisions of the Act that aim toward improving rather than merely maintaining air quality. 685 F.2d at 726-27; Chevron Pet. Cert. App. at A-16-18. This ruling rests upon a misconstruction of both the Clean Air Act and ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978).

First, there is no inconsistency between the bubble concept and either the language of the Act or the purpose of Congress in bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part

D of the Act, 42 U.S.C. §§ 7501-7508. In fact, as the Harvard Study presented herein demonstrates, considerably greater improvement in air quality may be achieved with the bubble concept than without it.

Second, absent such inconsistency, the policy judgment of the Administrator of the Environmental Protection Agency, which is reflected in the challenged regulations, must be sustained. Batterton v. Francis, 432 U.S. 416 (1977), and Train v. NRDC, 421 U.S. 60 (1975). Contrary to the decision of the court of appeals in this case, ASARCO did not hold otherwise and should not have been dispositive.

ARGUMENT

Mid-America contends that the decision of the court below rests upon a faulty construction of the Clean Air Act and upon a misapplication of the court's earlier decisions in ASARCO and Alabama Power Company v. Costle, 636 F.2d 323 (D.C. Cir. 1979). The court below erred when it found a "bright line" distinction between clean air programs designed to enhance air quality and those designed to maintain

existing air quality (with the bubble concept forbidden in the first category and mandated in the second). The court judged irrelevant the fact that the challenged regulation affects only the amount of bureaucratic review that must be conducted and that the regulation in no way lessens the obligations of the States to achieve air quality improvements in nonattainment areas.

By misreading ASARCO, the court was led to assume, incorrectly, that the bubble concept is inconsistent with the enhancement of air quality. The result of this error is that the court below not only undertook an impermissible foray into policy-making, but did so on the basis of an erroneous assumption that made its policy decision self-defeating.

I. Use of the bubble concept is consistent with the improvement of air quality.

Because the challenged regulations operate to reduce the amount of required bureaucratic review, there is (not surprisingly) little direct data on the effects of the bubble under the new source review program. The logic of the opinion below, however,

depends on the proposition that the bubble is incompatible with those programs that aim at the improvement (as opposed to the maintenance) of air quality. For that reason, a compelling analogy is provided by a case study of the use of the bubble at an existing source in a nonattainment area. This study, which involved the air pollution control program at the Middletown, Ohio steel plant of Armco Inc., was prepared for use at the Harvard Business School.[2]

> The Middletown plant site produced 3 million tons of steel yearly, covered 2,600 acres, employed roughly 7,000 people, and stockpiled (depending on the season) something on the order of 670,000 tons of raw materials. Its various operations were well monitored by the EPA. Even though measurements at only one of the monitoring stations on the periphery and in the vicinity of the plant exceeded the primary TSP [total suspended particulate] ambient air standard of 75 ug/m^3 (micrograms per cubic meter, a measure of density), that single station resulted in the Middletown area's being designated a "nonattainment" area.

Harvard Study Part A, at 1 (exhibits and footnotes

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[2] A. Kantrow, D. Dyer, and J. Fox, Armco and the Bubble Policy, (1981) (distributed by HBS Case Services, Harvard Business School, Boston, Massachusetts 02163 (herein cited as the "Harvard Study").

omitted).

To deal with Armco's problem and others like it, Congressional hearings and a White House conference were held. In addition, Anthony Solomon, the Undersecretary of the Treasury for Monetary Affairs, chaired a special task force on industry problems whose recommendations appeared in a December, 1977 report, A Comprehensive Program for the Steel Industry. The Committee recommended that government and industry cooperate in a fresh study of the problems of pollution control. Harvard Study at 2.

The traditional regulatory approach to particulate emissions had been based on short-term engineering convenience. The original regulatory structure under the Clean Air Act had to be developed quickly and had to employ then-available engineering techniques which could be implemented promptly. .This stopgap approach, however, left room for considerable improvement as a comprehensive program for overall air quality. Id. at 5.

> Emissions standards, as then fixed by legislation, generally applied on a process-by-process basis to each individual stage of the steelmaking operations. They also applied, on a point-by-point basis, to

> individual sources of pollution. As a result, plants in violation of ambient air standards for total emissions could not remedy the situation merely by undertaking that mix of corrective actions that would have the greatest immediate effect on overall ambient air quality. Even though the problem had to do with the general level of TSP emissions, corrective action had to be addressed to specific contributory sources - whether or not they were responsible for the bulk of the problem.

Id. at 5. Thus, the stack by stack control approach that originally had been adopted merely because it afforded the easiest method of measuring emissions from stacks did not necessarily lead to the most effective reduction of air pollution.

This regulatory scheme contained several flaws that resulted in counterproductive attempts at pollution control. For example, the view that success in pollution abatement should be measured solely in terms of the absolute level of TSP reduction per individual source ignores the differences in marginal costs for improvements at a given smokestack. As the Harvard Study pointed out, the first 95% of TSP reduction for an electric furnace costs 3.5¢/lb; the next 4%, 30¢/lb; and the final 1%, $35.00/lb. Id. at 6. When

attempting to regulate steel or any financially pressed industry, such numbers cannot be ignored.

Similarly, the traditional approach tended to overlook the fact that pollution control requires energy and that the production of energy itself causes pollution. There is a law of diminishing returns in control activity, and there is even a point where additional pollution control equipment indirectly creates more pollution than it prevents. For example, Armco noted that:

> to produce the electricity to run the fans and the motors to clean up the scarfing machines [at the Kansas City plant] meant that the local power plant would produce more pollution than [the control devices would] capture.

Id. at 6-7 (footnote omitted).

In search of alternatives to this kind of self-defeating regulation, EPA hired the Midwest Research Institute to develop a scientific basis for accurately estimating pollution from open dust sources, which hitherto had escaped control simply because such pollution was hard to measure. By 1978, the Institute had developed a series of emissions factor equations that made possible for the first time a full inventory of

pollution sources at an industrial site. This new technique, using a methodology called "exposure profile sampling", disclosed some surprising facts about Armco's Middletown plant.

> Contrary to expectations, roughly 60% of particulates came neither from stack nor process emissions but, instead, from open dust sources. Even when differential particle size was taken into account, the result remained pretty much the same. For all particulates less than 30 um (microns), open dust emissions were six times greater than process fugitive emissions, which were the focus of EPA concern. For particulates less than 5 um (the size most responsible for ambient air quality more than 1 mile from an industrial site), open dust emissions were still three times greater than process fugitive emissions.
>
> Given these figures, [Armco officials] realized that "there [was] very little room for further reduction [in TSP levels] from presently controlled sources by adding more efficient controls." To attack the remaining smokestack or process emissions would be to direct Armco's efforts toward a relatively minor part of the problem. . . .
>
> . . .To cite the most striking example, controlling windblown emissions from raw materials piles would remove 284 tons of particulates from the air each year (a reduction of some 60%) at a capital cost of $200,000 - or $704 per ton - and with an energy expenditure of 46 KWH per ton. By contrast, controlling fugitive emissions from open hearth operations would remove only 64 tons of particulates from the air each year (a reduction of 80%) at a capital cost of $4,000,000 - or $63,992 per ton - and with an energy expenditure of 179,700 KWH per ton. These were staggering numbers

> indeed. By focusing efforts on open dust instead of process fugitive sources, Armco could get more particulates out of the air at 1/89th the cost per ton and with 1/3906th the energy.

Id. at 8-9 (exhibit and footnote omitted).

After a thorough study and on-site monitoring of a pilot project for the Middletown plant, EPA announced the expected approval of Armco's bubble by EPA Administrator, Douglas M. Costle. In a press release issued October 20, 1980, EPA stated:

> 'It is our judgment that Armco will be able to satisfy the bubble requirements and EPA will be able to act favorably on Ohio's State Implementation Plan for the area affected by the plant when it is submitted by the State,' Costle said.
>
> . . . .
>
> . . .A joint air monitoring study by federal, state and local governments and Armco has confirmed in a pilot project that this bubble is effective and has resulted in significant improvements in air quality.
>
> Armco's 'bubble' dust control plan would eliminate 4,000 tons per year of particulates as compared to 652 tons per year under existing regulations.

Harvard Study, Part D, Ex. 2, p. 2-3 (quoting EPA "Environmental News") (emphasis added).

Following submission of the required technical support documents, EPA formally proposed the conditional approval of the Ohio plan on January 27, 1981,

46 Fed. Reg. 8683, and gave that approval on March 31, 1981, 46 Fed. Reg. 19468. The Harvard Study and the data obtained by EPA in support of the Ohio plan illustrate that a policy allowing use of the bubble concept can provide significantly greater improvement in air quality than a policy which precludes it.

In addition to providing greater improvements in air quality, the bubble policy may also speed up the achievement of clean air standards because it enables firms operating the sources of air pollutants to revise their control policies to achieve the most cost effective method of meeting the requirements of the Act. Plant engineers are thus encouraged to invent new and more effective pollution control devices.

> Traditional 'command and control' regulations may actually deter the development of new technology because firms, fearing that new items of capital equipment will be specifically required, may hide information about more effective means of pollution reduction. By contrast, the bubble would serve as an incentive for developing cost-effective pollution control technology since, when not forced to use particular technologies, a buyer will choose the least expensive means of satisfying emissions limitations.

Comment, An Overview of the Bubble Concept, 8 Colum. J. Envtl. L. 137, 155 (1982).

It should also be pointed out that the bubble concept is not a device that substitutes control of less harmful emissions in a tradeoff for more hazardous air pollutants. The equivalence of tradeoffs can and should be addressed directly. Limitations designed to ensure that the facility-wide definition of stationary source is used to improve air quality and meet other requirements of the Act are quite compatible with the bubble concept. See EPA's Widening Embrace of the Bubble Concept: The Legality and Availability of Intra-Source Trade-Offs, 9 Envtl. L. Rep. 10027, 10029 (1979).

Thus, since the use of the bubble concept has been shown to be capable of improving air quality, use of the bubble in nonattainment areas is not inconsistent with the purpose of Congress in enacting Part D of the Act.

II. The policy judgment of the Administrator was rejected in a way that conflicts with Batterton and Train.

It is well established both by principles of administrative law and by the decisions of this Court that in

the absence of a conflict between the policy judgment of an agency administrator charged with responsibility for implementing a federal statute and either the language or purpose of the statute, the agency decision must be sustained. See Administrative Procedure Act, 5 U.S.C. § 706 (1976); Batterton v. Francis, 432 U.S. 416 (1977); and Train v. NRDC, 421 U.S. 60 (1975). In the decision below, that principle was turned on its head when the court of appeals substituted its judgment for the policy decision of the EPA Administrator to approve state implementation plans allowing the use of a bubble concept which is based on the language of the Act itself.

The presumption in favor of the agency's policy judgment is based on practical concerns about the proper utilization of agency expertise. As noted in Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978):

> The administrative agency clothed with responsibility for implementing congressional pronouncements is generally well acquainted with the policy of the statute it administers. This is particularly true when the agency has long been involved in the construction and administration of a given statute or its predecessors. Where, as here, the agency has extensive experience, has relied on the common meaning of the relevant statute's specific language, and can point to important

> congressional purposes furthered by its interpretation, only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations.

The special competence of EPA to interpret its mandate under the Clean Air Act is well recognized. In Train, this Court sustained an EPA regulation as "sufficiently reasonable" without going so far as to hold that such construction was "the only one it permissibly could have adopted." 421 U.S. at 75.

This Court has also noted that judicial review should allow a proper degree of flexibility for administrative proceedings:

> The fact that the interpretation placed on the section by the Agency may on occasion require administrative flexibility and ingenuity to a greater degree than would a more rigid alternative is not, of course, a reason for rejecting the Agency's otherwise reasonable construction.

421 U.S. at 94 n. 28.

The limitations on judicial review of administrative action were reiterated by this Court in Batterton as follows:

> In a situation of this kind, Congress entrusts to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A

> reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.

432 U.S. at 426.[3]

Under these circumstances, where there is no conflict with the language of the Act, a reviewing court should confine itself to deciding whether the Administrator "exceeded his statutory authority" and whether the "regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. The decision below clearly failed to do so. As a result, the court of appeals substituted its judgment for a policy judgment of the EPA Administrator that does not conflict with either the language or the purpose of the Act.

Obviously there is no conflict with the language of the Act, which was used verbatim by the EPA

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[3] Here, the court of appeals noted specifically that "EPA, it is not disputed, has authority to define the constituent terms of source enumerated in the statute ('building, structure, facility or installation') in a manner that will best effectuate the expressed purposes of the Act." 685 F.2d at 723 n. 22; Chevron Pet. Cert. App. at A-9 n. 22.

Administrator. Nor is there any conflict with any purpose of the Act. The challenged regulations in absolutely no way reduce the obligations of the States or the affected industries to proceed with the cleanup of the air in nonattainment areas. Indeed, as the Harvard Study demonstrated, the bubble actually may speed up the attainment of air quality standards in such areas.

Instead of pointing to a conflict with the language or purpose of the Act, the court relied solely on its prior decision in ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978), as having established that the bubble concept is inconsistent with the improvement of air quality.[4] ASARCO, however, held neither that the bubble concept is incompatible with improving air quality, nor that use of the bubble is forbidden in nonattainment areas.[5] The regulation involved in

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[4] 685 F.2d at 727-28; Chevron Pet. Cert. App. at A-16-17. "We express no view on the decision we would reach if the line drawn in Alabama Power and ASARCO did not control our judgment." Id. at 720 n. 7; Chevron Pet. Cert. App. at A-4 n.7.

[5] Amicus here assumes arguendo that ASARCO was

ASARCO sought to redefine the statutory term "facility" in Section 111 of the Act to mean "a combination of such units." 578 F.2d at 327. This was rejected as "inconsistent with the language of the Act." Id. (emphasis supplied). The ASARCO court clearly stated that its consideration of "the purpose of the Clean Air Act and Section 111" merely "reinforced" its decision, which was based on this conflict between the language of the regulation involved in that case and the language of the Act. Id. No such conflict exists in the present case. The regulation here at issue incorporates the relevant statutory language verbatim. It does not redefine "facility" or any other statutory term.[6] Accordingly, since the basis of the ASARCO decision is completely inapplicable to this case, it should not have been dispositive here.

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correctly decided on its own terms. The alternative argument that ASARCO should not be dispositive here because it was incorrectly decided and conflicts with Alabama Power must also be noted. See Chevron Pet. Cert. pp. 7-10.

[6] ASARCO expressly noted that, in proper circumstances, the statutory term "facility" could cover an entire plant. 578 F.2d at 324 n. 17.

The reinforcing dictum of ASARCO that the bubble concept is inconsistent with "the purpose of the Clean Air Act and Section 111," could not and did not establish that the different application of the bubble concept which the Administrator here adopted in the verbatim language of Section 111 is inconsistent with the improvement of air quality under Part D of the Act.[7] By ruling otherwise, the court below failed to make even one of the rulings or findings required to set aside the action of the Administrator under the Administrative Procedure Act, 5 U.S.C. § 706. Policy decisions of an agency are "entitled to more than mere deference or weight" and can be set aside only if the Administrator "exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Batterton v. Francis, 432 U.S. at 416, 426.

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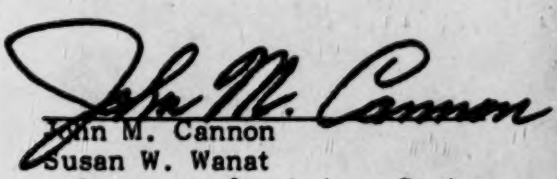
[7] 578 F.2d at 327-30 (emphasis added). Even if ASARCO had done so, such a conclusion would be subject to reconsideration as inconsistent with the factual data subsequently developed by EPA, including the measurement techniques developed for EPA by the Midwest Research Institute and the joint monitoring study at Middletown. See pp. 11-14 supra.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,



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